Supreme Court, U.S.
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CASE NO.

in the Supreme Court of the United States

OCTOBER TERM, 1994

CHRISTIAN W. SCHMIDGALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

DID THE COURT OF APPEALS ERRONEOUSLY AFFIRM THE DENIAL OF SCHMIDGALL'S MOTION TO DISMISS THE INDICTMENT FOR A *KASTIGAR* VIOLATION WHERE BOTH THE PROSECUTOR AND THE CASE AGENT AGAINST SCHMIDGALL HAD BEEN EXPOSED TO SCHMIDGALL'S IMMUNIZED STATEMENTS BY VARIOUS MEANS BUT HAD FAILED TO SEGREGATE THEMSELVES OR THE IMMUNIZED STATEMENTS FROM THE INVESTIGATION OF THE CASE AGAINST SCHMIDGALL?

II.

DID THE TRIAL AND APPELLATE COURTS APPLY AN INCORRECT STANDARD FOR DETERMINING HARMLESS ERROR WHEN THEY CONCLUDED THAT THE INTRODUCTION BEFORE A GRAND JURY OF INFORMATION TAINTED BY A *KASTIGAR* VIOLATION COULD BE HARMLESS?

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REPORT OF OPINION BELOW

The opinion below is reported as *United States v. Schmidgall*, 25 F.3rd 1533 (11th Cir. 1994). The opinion in the companion case to the case below, reference to which may be necessary in deciding this petition, is reported as *United States v. Schmidgall*, 25 F.3rd 1523 (11th Cir. 1994).

STATEMENT OF JURISDICTION

The Petitioner CHRISTIAN W. SCHMIDGALL seeks certiorari review, pursuant to Title 28, United States Code, Section 1254(1), of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit of July 14, 1994. The Eleventh Circuit affirmed the Petitioner's conviction and sentence. The Petitioner timely filed both a petition for rehearing and a suggestion for rehearing en banc. The Eleventh Circuit denied both rehearing and rehearing en banc by its order of September 23, 1994. (A. 86).

APPLICABLE CONSTITUTIONAL PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

The Petitioner CHRISTIAN W. SCHMIDGALL gave statements to government agents on January 26, 1988 in Miami, Florida and on December 5, 1988 in Birmingham, Alabama. (Appendix 8, 9-10, 24, 26). Both statements concerned, among other topics, a drug smuggling venture that had taken place in Sumter County, Alabama in December of 1985. (App. 6, 8, 9, 71). SCHMIDGALL acted as a radio operator for the smugglers during this venture. (App. 9). The government below conceded that SCHMIDGALL had received use and derivative use immunity for the January 1988 statement. (App. 8, 24). The government at first asserted that SCHMIDGALL had not received immunity for his December 5, 1988 statement. (App. 58). The district court eventually found, however, that SCHMIDGALL had received use and derivative use immunity for the December 1988 statement as well as for the January 1988 statement. (App. 59, 60).

The prosecutor below, Assistant United States Attorney Robert J. McLean, was present when SCHMIDGALL gave his December 1988 statement. Thomas Coram, the case agent and the eventual grand jury witness against SCHMIDGALL, was also present. (App. 9, 61). Coram prepared a written report summarizing SCHMIDGALL'S December 1988 statement.

Coram and McLean had not been present when SCHMIDGALL gave his first statement in January of 1988. During the period between SCHMIDGALL'S first and second statements, however, Coram and McLean did communicate with other government agents who had been present when SCHMIDGALL gave the first statement. Coram discussed SCHMIDGALL'S involvement in the case with United States Coast Guard Lieutenant David Hume and with United States Customs Service Agent Ronald

Ingleby, both of whom had been present when SCHMIDGALL gave his first statement. (App. 10n.4, 61-62). McLean discussed the case with Ingleby. McLean also discussed the case with United States Customs Service agent Donald Schmidt. (App. 10n.4, 62). Schmidt had not attended SCHMIDGALL'S first statement in person, but had reviewed handwritten notes of it. (App. 25, 31). Coram reviewed reports of witness interviews Schmidt had made after reviewing the notes of SCHMIDGALL'S first statement. (App. 10n.4).

During the period between SCHMIDGALL'S first and second statements McLean and Coram investigated and prepared a case against SCHMIDGALL. They continued their investigation after SCHMIDGALL gave his second immunized statement in December of 1988. For example, Coram interviewed witness Steven Purvis in August or September of 1989, months after SCHMIDGALL had given his second statement. (App. 10).

McLean did not at first realize that he had given SCHMIDGALL immunity at the December 5, 1988 interview or that SCHMIDGALL had received immunity for the January 1988 statement. McLean did not realize that SCHMIDGALL might have immunity until August of 1989. At that time he testified at a *Kastigar* hearing in Mobile, Alabama in another case against SCHMIDGALL. Only after testifying at the hearing in Mobile did McLean realize that use of information derived from SCHMIDGALL'S statements might be prohibited and that he might have to segregate information derived from SCHMIDGALL'S statements from other information in the case.

Coram received no instructions from McLean about the use of SCHMIDGALL'S statements until December of 1990, immediately before he appeared before a grand jury

to testify against SCHMIDGALL. Only then did McLean advise Coram not to use any information derived from SCHMIDGALL'S statements. (App. 10n.4, 61). Thus, Coram did not know that SCHMIDGALL might have immunity for a period of almost two years after SCHMIDGALL gave his second immunized statement.

In December of 1990, Coram appeared before a grand jury to testify against SCHMIDGALL. (App. 10, 61). He attributed the information about which he testified to Steven Purvis, Tony Chambless, and others. (App. 11-12, 77-78). Coram testified about a drug smuggling venture that took place at a hunting camp near Sumter, Alabama in December of 1985. Coram attributed to all three witnesses testimony that SCHMIDGALL was present at the hunting camp as a radio operator during the smuggling operation. Only the testimony Coram attributed to Purvis and Chambless, however, contained specific details about SCHMIDGALL'S actions as a radio operator. For example, Coram attributed to Chambless and Purvis, but not to Wood, testimony that SCHMIDGALL was seen setting up an antenna and other equipment at a mobile home located at the hunting camp. (App. 14, 16, 78).

The grand jury indicted SCHMIDGALL on December 5, 1990. On February 26, 1991, SCHMIDGALL filed a motion to dismiss the indictment and for other relief based on *Kastigar v. United States*, 406 U.S. 441 (1972). He argued in the motion that he had received use and derivative use immunity for his January, 1988 and December, 1988 statements. He also argued that the government's case against him was based, at least in part, on evidence derived from those two statements. (App. 60-63).

The government conceded that SCHMIDGALL had received use and derivative use immunity for the January

1988 statement, but not that he had received immunity for the December 1988 statement. (App. 8, 24, 58). The government also did not concede that it had used either statement within the meaning of *Kastigar* and its progeny. The parties litigated those issues.

After holding *Kastigar* hearings on August 21, 1991 and August 27, 1991, the district court issued a Memorandum Opinion on January 13, 1992. In this Memorandum Opinion, the district court found that SCHMIDGALL had indeed received use and derivative use immunity for the December 1988 statement as well as for the January 1988 statement. (App. 59-60). The court concluded, however, that the government had not used any evidence derived from SCHMIDGALL'S statements with the possible exception of evidence obtained from Purvis and Chambless. (App. 65-66).

The district court rejected SCHMIDGALL'S argument that the prosecutor McLean and case agent Coram had to have used information derived from SCHMIDGALL'S statements in preparing the case against him because they had both been personally present when he gave his December 1988 statement and had been exposed in various ways to his January 1988 statement. The court recognized that Coram was present at the time SCHMIDGALL gave his December 1988 statement and hence was "definitely" aware of the contents of that statement. (App. 64). The court concluded, however, that "it is not enough to merely suggest that Coram was somehow tainted by his mere presence," thereby placing a burden on SCHMIDGALL to trace evidence to establish how Coram's knowledge of SCHMIDGALL'S statement tainted evidence Coram acquired later or tainted his grand jury testimony. (App. 64). The district court referred the case to a Magistrate Judge for the purpose of determining whether SCHMIDGALL'S statements had either led to the

Government's discovery of Purvis or Chambless or had tainted any evidence the Government obtained from Purvis or Chambless. (App. 65-66).

The Magistrate Judge found in the referral proceedings that the government's use of information obtained from Steve Purvis had violated Schmidgall's derivative use immunity but that the tainted information from Purvis had been harmless beyond a reasonable doubt. (App. 78, 80).

On March 13, 1992, the trial court issued a second Memorandum Opinion and order adopting the recommendations of the Magistrate Judge and denying SCHMIDGALL'S motion to dismiss. (App. 82-85). On May 8, 1992, SCHMIDGALL entered a conditional plea of guilty under Rule 11(a)(2), Federal Rules of Criminal Procedure, and thereby reserved his right to appeal the denial of his motions to dismiss and suppress. The trial court then sentenced SCHMIDGALL and entered a judgment of conviction. SCHMIDGALL timely appealed the judgment.

The United States Court of Appeals for the Eleventh Circuit took jurisdiction over the appeal under Title 28, United States Code, Section 1291, since SCHMIDGALL was appealing a final judgment of a district court. The court of appeals affirmed the ruling of the district court that the only tainted information the government used was the information obtained from Purvis. (App. 14, 15). The court also affirmed the ruling that the government's use of the tainted information from Purvis was harmless. (App. 16). The court expressly rejected SCHMIDGALL'S argument that the government had failed to prove nonuse of SCHMIDGALL'S statements because McLean and Coram had failed to segregate themselves from the

investigation after being exposed to SCHMIDGALL'S statements. (App. 11, 36).

ARGUMENT

I.

DID THE COURT OF APPEALS ERRONEOUSLY AFFIRM THE DENIAL OF SCHMIDGALL'S MOTION TO DISMISS THE INDICTMENT FOR A *KASTIGAR* VIOLATION WHERE BOTH THE PROSECUTOR AND THE CASE AGENT AGAINST SCHMIDGALL HAD BEEN EXPOSED TO SCHMIDGALL'S IMMUNIZED STATEMENTS BY VARIOUS MEANS BUT HAD FAILED TO SEGREGATE THEMSELVES OR THE IMMUNIZED STATEMENTS FROM THE INVESTIGATION OF THE CASE AGAINST SCHMIDGALL?

In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court held that in order to compel a witness to make potentially self-incriminating statements under a grant of immunity, the government had to grant an immunity coextensive with the protection against self-incrimination in the Fifth Amendment to the Constitution. The minimum required level of immunity was that which would place the witness in the same position as one who invoked the privilege against self-incrimination and declined to speak. *Kastigar*, 406 U.S. at 453.

The minimum required level of immunity under *Kastigar* is use and derivative use immunity. If the government chooses to prosecute a witness despite a grant of use and derivative use immunity, it may use only evidence from "a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460. In addition to being unable to use the immunized statement itself against the witness, the government also may not use

any evidence it has derived from the immunized statement. The government may use the immunized statement neither as an "investigatory lead" nor as a means of "focusing investigation on a witness as a result of his compelled disclosures." *Id.* As the court below acknowledged in the companion case to the case under review, the forbidden uses of a witness's immunized statement include its use to shape the questioning or testimony of other witnesses. *United States v. Schmidgall*, 25 F.3rd 1523, 1528 (11th Cir. 1994); *see United States v. North*, 910 F.2d 843, 856, 860 (D.C.Cir.), *petition for rehearing granted in part on other grounds*, 920 F.2d 940, 942 (1990), *cert. denied*, 500 U.S. 941 (1991) (use of the immunized testimony of a witness to refresh the recollection or focus the thoughts of other witnesses is a prohibited use under *Kastigar*).

The Court in *Kastigar* placed the burden of proof on the issue of the use of an immunized statement on the government. Once the existence of use and derivative use immunity is established or conceded, the government has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 460.

Where a prosecutor or case agent has read, heard, or otherwise been exposed to immunized testimony, it is logical to infer that the immunized testimony will influence later investigation and case preparation. If the prosecutor and case agent participate in the investigation of a witness after being exposed to that witness's immunized testimony, they may use the testimony as a lead indicating what witnesses to question and what documents to obtain and review. They may also use the immunized testimony to assist in obtaining evidence from witnesses about whom they already know. *See North*, 910 F.2d at 863, 866 (in

determining whether a *Kastigar* violation has occurred, a court must consider not only whether the immunized testimony has assisted the government in identifying witnesses but also whether it has influenced the content of those witnesses' testimony). The investigators may, for example, use the immunized testimony to select new topics about which to question witnesses and to frame questions to ask witnesses. They may also use the immunized statement as a guide to interpreting the testimony or statements of other witnesses. Indeed, the prosecutor and investigators will view every piece of evidence they acquire after being exposed to the immunized statement through the lens of the statement. All these problems are compounded when the prosecutor and agents directly exposed to the immunized statement communicate with other government agents about it and thereby influence their investigations.

When, therefore, people exposed to an immunized statement remain involved in the investigatory process, it becomes quite difficult to determine which evidence has come from lines of investigation derived from the immunized statement and which has not. Prosecutors and investigators acting in good faith are still unlikely to have memories reliable enough to reconstruct all of their past states of knowledge and to sort out all of the subtle investigatory trails leading to each piece of evidence. If investigators or prosecutors exposed to an immunized statement remain involved in the investigation, there is a strong probability that they have in some manner used the statement in their gathering of evidence, or have influenced others who then indirectly used it. This is so even if the prosecutors and investigators in good faith can not recall having used the immunized statement. *See Hampton v. United States*, 775 F.2d 1479, 1491 and n.53 (11th Cir. 1985).

Since under *Kastigar* the burden of proof is on the government, the government must bear the risk that imperfect memories or records will render it unable to prove nonuse. As the court in *North* put it, "the government *always* bears the burden of proof and [a court] may not infer findings favorable to the government." *North*, 910 F.2d at 867 (emphasis in original).

In light of the practical difficulties of proving that prosecutors and investigators exposed to immunized testimony have not used it in some manner to derive evidence, some courts have concluded that the government can not meet its burden of proof under *Kastigar* when the prosecutor or government investigators have read or heard the contents of an immunized statement but then have failed to segregate themselves reliably from the later investigation of the immunized witness. In *Hampton*, for example, the United States Court of Appeals for the Eleventh Circuit stated that

> Unless the government relies solely upon evidence obtained prior to the immunized testimony, [citation omitted] the principles of *Kastigar* generally require (as a practical matter) a showing that prosecuting officials and their agents were aware of the immunity problem and followed reliable procedures for segregating the immunized testimony and its fruits from officials pursuing any subsequent investigations.

Hampton, 775 F.2d at 1490.

The United States Court of Appeals for the Fourth Circuit, in *United States v. Harris*, 973 F.2d 333 (4th Cir. 1992), while declining to adopt a per se rule requiring recusal of a prosecutor exposed to immunized testimony, did note that the continued participation of a prosecutor

exposed to immunized testimony made the government's burden of proof under *Kastigar* more difficult. *Harris*, 973 F.2d at 337. In affirming a district court finding that the government had not proved independent sources under *Kastigar*, the court commented that

> The usual precautions, not followed in this case, are for the government to insulate a prosecutor and/or investigator who is familiar with the immunized statement from subsequent prosecution of the compelled witness or to seal the incriminating documents.
>
> *Id.*

In *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), the United States Attorney who later prosecuted McDaniel in a federal case against him read transcripts of McDaniel's testimony before a state grand jury. The testimony McDaniel gave before the state grand jury pertained to matters relevant in the federal case as well. McDaniel had received automatic immunity under a state statute before giving his state grand jury testimony, but the prosecutor did not know about this grant of immunity when he read the grand jury transcript. He therefore took no precautions to insulate himself from the federal investigation of McDaniel or to segregate information derived from the grand jury transcript from the other sources of information in the case. The court concluded under those circumstances that the "testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *McDaniel*, 482 F.2d at 312. The government's failure to segregate the immunized testimony and the persons exposed to it from the investigation made its burden of proving nonuse under *Kastigar* "insurmountable." *McDaniel*, 482 F.2d at 311.

The court in *McDaniel*, in addition to imposing a segregation requirement, took the position that the prohibited uses of immunized testimony included nonevidentiary uses such as planning trial strategy. *McDaniel*, 482 F.2d at 311. A court imposing a segregation requirement need not, however, also accept the principle that *Kastigar* prohibits nonevidentiary uses of immunized testimony. The court in *Hampton*, for example, imposed a segregation requirement even though it accepted the Eleventh Circuit position that *Kastigar* prohibited only uses of immunized testimony leading to the introduction of evidence. If those exposed to immunized testimony do not segregate themselves reliably from the investigation of the immunized witness, the government's burden of proving that the immunized testimony did not influence the gathering of evidence will be just as insurmountable as its burden of proving that the immunized testimony did not influence trial strategy in some other respect.

The segregation requirement of *McDaniel* and *Hampton* creates a bright line rule that benefits the government as much as it benefits immunized witnesses. Under *Kastigar*, the government must prove a negative proposition. It must prove that it did not use immunized testimony against the immunized witness. A definite prophylactic rule such as the segregation requirement of *McDaniel* makes it relatively easy for the government to meet this burden of proof. The government need merely assure itself that the agents listening to or reading immunized testimony do not participate in any later investigation of the immunized witness. *See, e.g., United States v. Jones*, 542 F.2d 186, 199-202 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976) (district court correctly denied *Kastigar* motion where the state strike force before which Jones gave the immunized testimony effectively segregated itself from all later state and federal investigations of Jones).

In the absence of a segregation requirement, on the other hand, the government has no clear way of knowing whether it can meet its burden of proving nonuse. In the absence of a segregation requirement, agents exposed to immunized testimony may participate in the later investigation of the immunized witness. They will then somehow have to show that they did not use the immunized testimony despite knowing its contents. They will have to reconstruct all of their states of knowledge at various stages of the investigation. Due to the inevitable imperfections of human memory and the vagaries of any fact finding process, the government will remain uncertain until the conclusion of the *Kastigar* hearing whether its agents' reconstructions have successfully proved nonuse.

The absence of a segregation requirement or an equivalent bright line rule for determining compliance with *Kastigar* will therefore lead to uncertainty on the part of the government as to the procedures required to comply with *Kastigar*. Such uncertainty will tend to discourage the use of immunized witnesses, thus depriving the government of a useful and often essential law enforcement tool.

Potential immunized witnesses also need to know where they stand under *Kastigar*. Potential witnesses, before making intelligent decisions to give self-incriminating testimony, must know the exact scope of the protection they are receiving and the rights they are giving up. In the absence of a bright line rule such as the segregation requirement for determining when the government can prove nonuse, witnesses will not know exactly what they must establish in order to protect themselves while giving immunized testimony. They will not know exactly what the "immunity" they have been promised means. In the absence of a bright line rule imposing procedures for proving nonuse, there is a danger

that a court may impose a burden on the witness to trace evidence or otherwise to prove the government's use of the immunized testimony, even though *Kastigar* unequivocally places the burden of proof as to use on the government rather than the witness. Indeed, this appears to have happened in the case below, as the following discussion will show.

In the present case, the prosecutor Robert McLean was exposed to SCHMIDGALL'S immunized testimony in several ways. So was the case agent and grand jury witness against SCHMIDGALL, Thomas Coram. McLean and Coram were both personally present when SCHMIDGALL gave his second immunized statement on December 5, 1988. Coram and McLean therefore both knew what SCHMIDGALL had said during that statement. (App. 9, 61).

Coram and McLean were also exposed in various ways to SCHMIDGALL'S first immunized statement, which he gave on January 26, 1988. Between January 26, 1988 and December 5, 1988, Coram discussed the case with United States Coast Guard Lieutenant David Hume and with United States Customs Service agent Ronald Ingleby, who had both been present when SCHMIDGALL gave his first statement. (App. 10n.4, 61-62). McLean discussed the case with Ingleby. McLean also discussed the case with Customs agent Donald Schmidt, who had not attended the January 26, 1988 interview in person but who had reviewed notes of it. (App. 10n.4, 25, 31, 62). Coram also reviewed reports of various witness interviews Schmidt had conducted after reviewing the notes of SCHMIDGALL'S statement. (App. 10n.4). Thus, although McLean and Coram may not have known the ultimate source of the information about SCHMIDGALL they obtained from Hume, Ingleby, and Schmidt, they did receive information derived in various ways from

SCHMIDGALL'S January 26, 1988 statement in addition to the information they derived by being present at his December 5, 1988 statement.

McLean did not know there was a potential immunity problem until August of 1989, almost eight months after SCHMIDGALL gave his second statement. Only then, when he was called to testify at a *Kastigar* hearing concerning another case against SCHMIDGALL, did McLean learn of the need to segregate information derived from SCHMIDGALL'S statements from the other information in the case. Coram received no instructions from McLean to insulate himself until just before he went to the grand jury in December of 1990, almost two years after SCHMIDGALL'S second statement. (App. 10n.4, 61). Coram thus presumably took no precautions to segregate information derived from SCHMIDGALL'S statements until then.

McLean and Coram interviewed witnesses and reviewed documents pertaining to the case against SCHMIDGALL during the period between SCHMIDGALL'S first and second statements and after SCHMIDGALL'S second statement. During most of this period in the case of McLean and almost all of it in the case of Coram, they took no precautions to segregate information derived from SCHMIDGALL'S statements from other information in the case. The logical inference from these facts is that, perhaps without realizing it, Coram and McLean relied in part on information derived from SCHMIDGALL'S statements in preparing the case against SCHMIDGALL and presenting it to the grand jury. A reasonable court should conclude under these facts, as did the court in *McDaniel* under similar facts, that the government's burden of proving nonuse of SCHMIDGALL'S statements is insurmountable.

The Eleventh Circuit in the opinion below, however, refused to require investigators exposed to the immunized testimony to be segregated from later investigation of the immunized witness. *Schmidgall*, 25 F.3rd at 1537. (rejecting argument that any investigator exposed to immunized testimony was per se tainted). The court took a similar position in the companion opinion. *Schmidgall*, 25 F.3rd at 1531-32. The district court and Eleventh Circuit instead placed a burden on SCHMIDGALL to prove that the government's knowledge of SCHMIDGALL'S statements tainted some specific piece of evidence it had obtained. In rejecting the segregation requirement, the Eleventh Circuit adopted a position inconsistent both with its own earlier opinion in *Hampton* and with the view of the Eighth Circuit expressed in *McDaniel*. It also effectively placed a burden of proof on SCHMIDGALL and hence adopted a burden of proof rule inconsistent with *Kastigar*.

Conflict among the circuits concerning the existence of a segregation requirement will lead to uncertainty concerning the appropriate burden of proof in *Kastigar* proceedings. It will also lead to uncertainty regarding the procedures required to comply with *Kastigar*. This uncertainty will discourage government use of the immunity procedure and will impair the rights of immunized witnesses to protection coextensive with the rights they are giving up. The Court should therefore accept this case for certiorari review in order to resolve the intercircuit conflict concerning the segregation requirement and to clarify the appropriate burden of proof in *Kastigar* proceedings.

II.

DID THE TRIAL AND APPELLATE COURTS APPLY AN INCORRECT STANDARD FOR DETERMINING HARMLESS ERROR WHEN THEY CONCLUDED THAT THE INTRODUCTION BEFORE A GRAND JURY OF INFORMATION TAINTED BY A *KASTIGAR* VIOLATION COULD BE HARMLESS?

The district court concluded that when Coram gave the grand jury testimony attributed to Steven Purvis, he had impermissibly used Schmidgall's immunized statements within the meaning of *Kastigar*. It nevertheless concluded that the use of Purvis's tainted statements was harmless beyond a reasonable doubt and refused to dismiss. (App. 78, 80, 82-85). The court of appeals affirmed the district court finding that Purvis's testimony was tainted but harmless. (App. 16). In doing so the court of appeals applied a standard for determining the harmlessness of the error that was inconsistent with the harmless error jurisprudence of this Court. Application of the lower courts' standard for determining harmless error in the introduction of tainted evidence before a grand jury will likely impair both the preservation of the rights of the accused under *Kastigar* and the integrity of the grand jury process.

In *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991), this Court ruled that certain "structural" errors in criminal proceedings can never be harmless. Structural errors affect the entire framework of the trial or proceeding rather than simply leading to the admission or exclusion of particular evidence or some other particular error in the trial. *Fulminante*, 111 S.Ct. at 1265 (Opinion of Rehnquist, C.J.). *Cf. Chapman v. California*, 386 U.S. 18 (1967) (propounding "harmless beyond a reasonable doubt" standard applicable to most constitutional errors).

In *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), the Court held that a constitutionally deficient reasonable doubt instruction is a structural error requiring automatic reversal without any harmless error analysis. *Sullivan*, 113 S.Ct. at 2082-83. A deficient reasonable doubt instruction does not merely affect a piece of evidence but instead distorts the way in which the jury views all of the evidence in the case. Its effects are "necessarily unquantifiable and indeterminate," making any harmless error analysis futile. *Id.*

Application of the "harmless beyond a reasonable doubt" standard to the introduction of tainted evidence before a grand jury is inconsistent with *Fulminante* and *Sullivan*. In the grand jury process, there is no adversary procedure. There is no system of cross examination or opposing argument to encourage jurors to evaluate the credibility of witnesses or to place pieces of evidence in their proper context. Each piece of evidence is presented as the equal of every other piece of evidence. It therefore becomes extremely difficult to determine what pieces of evidence or combination of pieces of evidence have persuaded the grand jurors to indict. As far as anyone can determine, once the grand jurors have been exposed to tainted testimony, they view every other piece of evidence introduced before them through the perspective created by the tainted testimony, so that it becomes impossible to say that the grand jurors would have indicted without the tainted testimony. The precise effect of tainted testimony on a grand jury is therefore unquantifiable, just as the effect of the improper reasonable doubt instruction in *Sullivan* was unquantifiable.

In addition, any attempt to isolate the effect of a particular piece of evidence on the grand jurors' decision to indict necessarily requires an examination of the grand jurors' thought processes. Such an examination will lead to

second guessing of the grand jurors' deliberative process and hence will impair the policy of grand jury secrecy. *Cf. United States v. Hinton*, 543 F.2d 1002, 1009-10 (2nd Cir. 1976) (adopting rule that a grand jury before whom an immunized witness testifies cannot indict that witness; adopting the rule in order to eliminate the need for an examination of the grand jurors' deliberative process and the consequent threat to grand jury secrecy).

In the present case, the district court and court of appeals concluded that the use of Purvis's tainted testimony was harmless beyond a reasonable doubt because it merely duplicated other, supposedly untainted testimony placing SCHMIDGALL at the hunting camp. (App. 14-16, 78, 80, 82-85). One cannot conclude beyond a reasonable doubt that Purvis's testimony had such a limited effect, however. Coram testified to the grand jury that two witnesses, Chambless and Purvis, saw SCHMIDGALL setting up radio equipment at the hunting camp. Without the tainted testimony of Purvis, there was only one uncorroborated witness, Chambless, who saw and could describe in detail SCHMIDGALL'S activities at the hunting camp. (App. 14, 78). One cannot say beyond a reasonable doubt that the reference to two seemingly independent witnesses who saw SCHMIDGALL setting up equipment at the hunting camp, rather than just to one uncorroborated witness, did not influence the grand jury's decision to indict.

More importantly, the court of appeals applied a standard inconsistent with the precedents of this Court when it analyzed whether the *Kastigar* violation in introducing Purvis's tainted testimony before the grand jury was harmless. Any attempt to isolate the effect of Purvis's testimony on the grand jurors would require an analysis of the grand jurors' thought processes such as that contained in the opinion below or in the preceding

paragraph. In order to avoid this invasion of the grand jury's deliberative process, the introduction of tainted evidence before a grand jury should be treated as a structural error inherently warping the entire grand jury process. The court below deviated from the principles of *Fulminante* and *Sullivan* when it treated the introduction of tainted evidence before the grand jury as a nonstructural error which could be evaluated under the ordinary rules for evaluating the prejudicial effect of an error.

CONCLUSION

In light of the foregoing arguments, the Court should accept this case for certiorari review and should reverse the Eleventh Circuit's affirmance of SCHMIDGALL'S conviction and sentence.

Respectfully submitted,

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